

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

UNITED STATES OF AMERICA

§

§

V.

§

CRIMINAL NO. 6:02-CR-64-005

§

KENNETH WAYNE NICHOLSON

§

**REPORT AND RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE**

On September 25, 2007, the Court conducted a hearing to consider the government's petition to revoke the supervised release of Defendant Kenneth Wayne Nicholson. The government was represented by Mary Ann Cozby, Assistant United States Attorney for the Eastern District of Texas, and Defendant was represented by attorney Kelly Pace.

Defendant originally pleaded guilty to the offense of Possession With Intent to Distribute Methamphetamine, a Class B felony. The offense carried a statutory maximum imprisonment term of forty (40) years. The United States Sentencing Guideline range, based on a total offense level of 21 and a criminal history category of I, was 37 to 46 months. On February 10, 2003, U.S. District Judge Leonard Davis of the Eastern District of Texas sentenced Defendant to 37 months incarceration followed by a three year term of supervised release, subject to the standard conditions of release, plus special conditions to include financial disclosure and participation in a program of testing and treatment for drug abuse. On October 13, 2003, Defendant completed the term of imprisonment and began his term of supervised release.

Under the terms of the supervised release, Defendant was prohibited from possessing a controlled substance. In its petition, the government alleges that Defendant violated his conditions of supervised release by possessing amphetamine/methamphetamine as evidenced by Defendant's

urine samples which tested positive for amphetamine/methamphetamine on February 14, 2007; February 21, 2007; March 7, 2007; and March 15, 2007.¹ The government also alleges Defendant violated his conditions of supervised release by failing to attend scheduled drug counseling sessions, and by not providing a urine specimen as instructed by random drug testing program on March 2, 2007; March 6, 2007; March 11, 2007; and March 20, 2007.

If the Court finds by a preponderance of the evidence that Defendant committed these violations, a statutory sentence of no more than three years of imprisonment may be imposed. 18 U.S.C. § 3583(e)(3). Section 7B1.1(b) of the Sentencing Guidelines indicates that when there is more than one violation of the conditions of supervision, or the violation includes conduct that constitutes more than one offense, the grade of the violation is determined by the violation having the most serious grade. Pursuant to Section 7B1.1(a) of the Sentencing Guidelines, violating a condition of supervision by possessing amphetamine/methamphetamine would be a Grade B violation, for which the Court shall revoke probation or supervised release. U.S.S.G. § 7B1.3(a)(2). Considering Defendant's criminal history category of I, the Guideline imprisonment range for a Grade B violation is 4 to 10 months. U.S.S.G. § 7B1.4(a).

At the hearing, the parties indicated they had come to an agreement to resolve the petition whereby Defendant would plead true to the violations. In exchange, the government agreed to recommend a sentence of eight months to run consecutively with charges in 6:07-cr-79, and with no term of supervised release to follow the present charges.

Pursuant to the Sentencing Reform Act of 1984, the Court **RECOMMENDS** that Defendant

¹Based on 5th Circuit case law, the Court may find that illicit drug use constitutes possession. *See, e.g., U.S. v. Courtney*, 979 F.2d 45, 49 (5th Cir. 1992).

Kenneth Wayne Nicholson be committed to the custody of the Bureau of Prisons to be imprisoned for a term of 8 months with no supervised release to follow, with the term of incarceration to run consecutively with charges in 6:07-cr-79.

The parties have waived their right to object to the findings of the Magistrate Judge in this matter so the Court will present this Report and Recommendation to District Judge Leonard Davis for adoption immediately upon issuance.

So ORDERED and SIGNED this 2nd day of October, 2007.



JOHN D. LOVE
UNITED STATES MAGISTRATE JUDGE